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IN THE

Supreme Court of the United States

October Term, 1965

No. 77

AUTOMATIC FIRE ALARM COMPANY OF DELAWARE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
For the District of Rhode Island

BRIEF FOR APPELLANT AUTOMATIC FIRE ALARM COMPANY OF DELAWARE

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IDENTIFICATION OF DESIGNATIONS

Name	*Designation*
Automatic Fire Alarm Company of Delaware (the appellant, a Delaware holding Company, formed in 1920 which thereafter acquired a controlling stock interest in AFANY)	AFADEL
Automatic Fire Alarm Company (a non-defendant, New York corporation, originally organized in 1873, which became a subsidiary of the appellant AFADEL in 1920)	AFANY
American District Telegraph Company (a defendant appellant)	ADT
Grinnell Corporation (a defendant appellant originally known as General Fire Extinguisher Company)	Grinnell
Holmes Electric Protective Company (a defendant appellant)	Holmes
Conclusions of Law	CL
Findings of Fact	FF
Opinion on Liability	OL
Opinion on Remedy	OR
Central Station Protection Service	CSPS
Sprinkler Supervisory and Water Flow Alarm Service (also known as Sprinkler Supervisory and Valve Alarm Service)	SSWF
Sprinkler Supervisory Service	SSS

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Opinion Below

The opinion of the District Court is reported at 236 F. Supp. 244, and 1964 Trade Cases ¶71,298. The opinion includes findings of fact, conclusions of law, opinion on liability, and opinion on remedy (R 741).

Jurisdiction

This action was brought by the United States under the provisions of Section 4 of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U. S. C. §4) to enjoin alleged violations of Sections 1 and 2 of that Act.

The final decree was entered on November 27, 1964 (R 768), and on January 25, 1965 Automatic Fire Alarm Company of Delaware (hereinafter designated "AFADEL"[1]) filed its notice of appeal to the Supreme Court (R 778). On the same day, the Government as well as the defendants, Grinnell Corporation (hereinafter designated "Grinnell"), American District Telegraph Company (hereinafter designated "ADT"), and Holmes Electric Protective Company (hereinafter called "Holmes") also filed notices of appeal to the Supreme Court. (See Nos. 73, 74, 75 and 76.) The time for filing all jurisdictional statements and for docketing the case was extended until April 19, 1965 (R 785, 787). On May 17, 1965 probable jurisdiction was noted by this Court (R 778; 381 U. S. 910).

Jurisdiction of the appeal is conferred on the Supreme Court by Section 2 of the Expediting Act of February 11, 1903 as amended, 32 Stat. 823, 15 U. S. C. §29. Cases supporting jurisdiction are: *United States* v. *Continental Can Company*, 378 U. S. 441 (1964); *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962); *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956).

Statutes Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

1. A complete table of abbreviated designations used herein is printed at page vi, *supra*.

Sections 1, 2 and 4 of the Sherman Act (26 Stat. 209 (1890), as amended, 15 U. S. C. §§1, 2, 4) provide in pertinent part:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor * * *."

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

"Sec. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; * * *. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited * * *."

Questions Presented

A. As to Restraint and Monopoly

1. Whether the District Court properly held that the burden of proof shifts to defendants charged with monopolization in violation of Section 2 of the Sherman Act as soon as the Government shows the relevant market and that the defendants collectively have a major share of that market.

2. Whether in the present case the relevant market was properly confined to insurance accredited Central Station Protection Service (hereinafter designated "CSPS") supplied throughout the United States.

3. Whether any of the activities of Automatic Fire Alarm Company of New York (hereinafter designated "AFANY"), the only AFADEL operating subsidiary, having only three central stations, each operating within a single state, were in interstate commerce, or had any substantial effect thereon.

4. Whether AFADEL was properly treated as an integral part of a group consisting of AFADEL, ADT and Holmes with all controlled by Grinnell, and thereby held liable for having restrained and monopolized interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

5. Whether an agreement made between ADT and Holmes in 1906, at a time when ADT, Holmes and AFADEL[2] were not affiliated, and which was terminated by the parties thereto in 1947, was illegal and influenced the formation of subsequent business patterns of AFADEL after 1954 thereby justifying a finding of restraint of trade and monopolization by AFADEL.

6 (a) Whether an agreement made in 1907 between ADT, AFANY, Grinnell and Automatic Fire Protection Company, not a defendant, at a time when none of the parties were affiliated and which contract expired in 1954 was illegal and influenced the business patterns of AFANY long after expiration, and thus supported a finding of restraint of trade and monopolization by AFADEL.

(b) Whether there was any other evidence sufficient to support the finding that AFADEL had violated Sections 1 and 2 of the Sherman Act.

(c) Whether it was unlawful for the three alarm company defendants which were commonly owned and controlled, not to compete with each other. (On this ques-

2. AFADEL was not incorporated until 1920. It was formed as a Delaware holding company and obtained majority stock control of AFANY, originally organized in 1873 under the name "Automatic Signal Telegraph Co. of the City of New York". After various changes of name AFANY became known as Automatic Fire Alarm Company in January 1900.

tion, AFADEL adopts and relies upon the presentation in the Grinnell brief (pp. 91 to 98).)

B. As to the Trial Itself

7. Whether AFADEL was deprived of due process of law and a fair trial in that:

(a) The trial judge forced the case to trial on 18 days' notice, without prior warning, without adequate pre-trial procedures and without allowing a reasonably sufficient time for final trial preparation;

(b) The trial judge failed to disqualify himself although he had formed a conclusion on the merits of the case prior to the commencement of the trial;

(c) The trial judge received en masse all the Government's evidence, including hearsay evidence and statements of alleged co-conspirators, without any previous foundation having been laid by independent evidence of the alleged conspiracy and any connection of AFADEL therewith; and

(d) The trial judge required AFADEL and its co-defendants to proceed with the defense without knowing what evidence offered by the Government was being actually received against them.

C. As to Relief Granted

8. Whether the prohibition of future acquisitions by AFADEL or its subsidiary AFANY in the designated market is a proper form of relief under the circumstances of the case.

9. Whether the decree appealed from properly prohibits indiscriminately every activity which might ever be held to be a violation of the Sherman Act in the designated market, and is so unclear and imprecise as to provide no reasonable opportunity to determine what constitutes a violation of the decree.

10. Whether the decree properly requires the filing of price lists and reports of deviations therefrom with the Antitrust Division of the Department of Justice.

11. Whether the prohibition of any employment of James Douglas Fleming, now a director of AFADEL, as an officer, director, agent, or otherwise after April 1, 1966[3] deprives AFADEL of liberty and freedom of action without due process of law in violation of the Fifth Amendment of the Constitution.

D. As to the Government's Appeal

12. Whether the additional relief requested by the Government as to AFADEL, *viz.*, sale of equipment to customers, one year service contracts, and visitation rights, is warranted under the circumstances of the case.

Statement of the Case

1. The Pleadings Below

The Government charged an over-all conspiracy to restrain and monopolize, and an attempt to monopolize, and monopolization of interstate commerce in CSPS against fire, burglary and other hazards throughout the United States in violation of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§1 and 2).

The complaint alleged that Grinnell, a manufacturer of automatic sprinkler systems and protection devices,[4] owns 75% of the stock of ADT which engages nationally in the CSPS business as well as the manufacture of protection devices; that Grinnell wholly owns Holmes, which engages in the same business in the cities of New York, Philadelphia and Pittsburgh; and that Grinnell owns approximately 88% of the stock of AFADEL, which engages in the same business directly or through subsidiaries in the cities of New York, Philadelphia and Boston (R 30-32).

3. On November 8, 1965, Mr. Justice Fortas stayed the decree until the judgment of the Supreme Court (—— U. S. ——, 86 S. Ct. 231).

4. Grinnell ceased manufacturing protection devices in 1961 (R 687-688).

The Government further alleged that subscribers for credited CSPS receive substantial discounts on hazard insurance premiums; that an installation charge is usually paid by the subscriber but title to the equipment installed is retained by the CSPS company; that the subscriber is then charged an annual service charge; that CSPS companies usually obtain contracts for periods of several years, and that if the contract is terminated, the protection devices are removed from the subscriber's premises (R 33).

The Government further alleged that in 1959 there were 33 central station companies in the United States with 94,000 subscribers in 119 cities, and that the income from such service in 1958 was over $60,000,000 (R 33-34).

The complaint (R 33-35) purports to give industry statistics which may be summarized as follows:

NATIONAL TOTALS

(1958-1959)

	CSPS Stations	*Cities*	*Subscribers*	*Revenue*
33 CSPS Companies	170	119	94,000	$60,000,000+

The complaint goes on to assert that in 1959 through stock interests in the other defendants, Grinnell controlled 136 central stations having 79,500 subscribers (85% of the national total) paying total annual service charges of $53,730,000 (90% of the national revenue) (R 35). The alleged breakdown of this may be summarized:

Defendant	*CSPS Stations*	*Cities*	*Subscribers*[5]	*Revenue*[5]
ADT	119	114	60,142 (64%)	$42,890,911 (72%)
Holmes	14	3	14,218 (15%)	$ 7,521,411 (12%)
AFADEL	3	3	5,167 (5%)	$ 3,324,662 (5%)

5. Approximate percentage of national totals is shown. During pre-trial proceedings, it was stipulated that AFADEL's percentages using national totals are closer to 2% (R 2266, 2268).

The Government further alleged that since 1906 the defendants or their predecessors entered into agreements defining areas in the United States in which they would provide central station service; limiting the types of such service which they would supply in certain areas; and providing for joint participation in the installation of certain systems and for dividing the revenue among themselves.

In addition to asking injunctive relief, the Government requested that Grinnell be required to dispose of all its capital stock interest in ADT, that ADT be required to divest itself of so much of its assets as may be necessary to assure competition on the local level; that ADT be required to divest itself of all manufacturing facilities for protection devices; that the subscribers be given title to equipment installed on their premises when ADT, Holmes or AFADEL have recovered their costs and overhead; that ADT, Holmes and AFADEL be required to contract in the future on a one-year basis or permit their subscribers to cancel without penalty after one year or at any subsequent anniversary, and that the defendants terminate all agreements between them and refrain from continuing to observe any of their provisions.

In its answer[6] AFADEL denied the basic charges but admitted that it has a subsidiary corporation providing CSPS at New York, Philadelphia and Boston; that Grinnell owns approximately 88% of the stock of AFADEL; that the subsidiary's service contracts are usually for a period of five years, and that on termination, the protection devices previously installed on the subscriber's premises are usually removed; and that in 1958 the subsidiary had 5,167 subscribers paying $3,324,662 in service charges annually.

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6. AFADEL's answer is not printed in the record. The lack of interstate commerce defense was set forth affirmatively as follows: "FOR A FIRST AFFIRMATIVE DEFENSE—TWENTY-SIXTH: Alleges that prior to 1906 and thereafter the furnishing of central station electric protection service, the furnishing or supply of services, systems, devices, and other means designed to protect against or to minimize losses arising out of fire, burglary or other hazards, and any and all agreements among or between defendants with respect thereto, were and are local and intrastate in character."

AFADEL also admitted that its subsidiary supplied certain protection devices used in connection with service by subsidiaries of ADT in the cities of New York, Philadelphia, and Boston, and that AFADEL received a percentage of the revenues of ADT from such service.

As an affirmative defense, AFADEL alleged that prior to 1906 and thereafter, all service and equipment and all problems relating thereto were local and intrastate in character. As a further affirmative defense, AFADEL alleged that all agreements between the parties other than those made after 1952 had expired long before the action, and that all issues relating to them were moot.

2. The Proceedings Below

District Judge Charles E. Wyzanski, Jr., of the District of Massachusetts, was assigned to hear the case after District Judge Edward W. Day of the District of Rhode Island and Chief Judge George C. Sweeney of the District of Massachusetts both found themselves disqualified on their own motion (R 299, 77, 78, 79).

There were lengthy pre-trial proceedings including 110 depositions containing 11,162 pages, and numerous interrogatories.

On May 28, 1964 without any previous warning Judge Wyzanski set the case down for trial for June 15, 1964 (R 256). On June 3, 1964 he denied a defendants' motion for postponement of trial, and overruled all objections to proceeding to trial at the time set (R 272-284). The application for postponement had been based on the grounds that there had not been adequate pre-trial proceedings to narrow the issues to be tried, and that reasonably sufficient time was not allowed to the defendants for completion of final preparation for trial (R 258-268).

On June 9, 1964, the defendant alarm companies filed a motion for an order disqualifying Judge Wyzanski on the ground of personal bias and prejudice (R 286-287). The supporting affidavits referred to comments made by Judge Wyzanski at the pre-trial hearing held on May 28, 1964 and asserted the belief based on such comments that he had

formed an opinion and view of the merits of the case, and had thus prejudged the case (R 287-298). Judge Wyzanski declined to grant the motion and referred the movants to Chief Judge Woodbury of the First Circuit who denied the motion on June 11, 1964 (R 299; 317).

Trial commenced on June 15, 1964, and was concluded on June 24, 1964 after a trial of six trial days. The Government called no witnesses. It offered numerous documentary exhibits and excerpts from 38 depositions amounting to 2,698 pages. After the defendants introduced excerpts from 47 depositions, the Government offered all of the 47 depositions containing 3,774 pages. The defendants called a number of witnesses and offered numerous documentary exhibits (R 350-698).

On October 9, 1964, after receiving post-trial briefs, Judge Wyzanski heard arguments (R 703). The opinion and the decree were simultaneously filed on November 27, 1964 (R 741; 768).

3. The History of Automatic Fire Alarm Company of Delaware and Its Relationship with the Other Alarm Company Defendants

The District Court failed to make specific findings showing the precise basis upon which it predicated its conclusions of liability on AFADEL's part. Instead AFADEL was treated as a part of a combination and conspiracy, and thus held responsible indiscriminately for every act of any of its co-defendants regardless of time or circumstances. The history of AFADEL and its ultimate relationship to its co-defendants, ADT and Holmes, is therefore most important in demonstrating the lack of evidence to support the judgment against AFADEL.

The Government based its charges on alleged illegal agreements beginning in 1906, and described those agreements as having been made by "the defendants or their predecessors" (R. 35). During the trial it appeared that there was an agreement between ADT and Holmes, made in 1906 (Ex. 61; R 1312). AFANY was not a party to that

agreement. In fact the record discloses no agreement between AFADEL or AFANY and Holmes.

The Government next offered several agreements, made in 1907 (Ex. 80-A, B and C; R 1362, 1373, 1380). AFANY was a party to two of these agreements (Ex. 80-C and 80-B; R 1380, 1373). It should be noted that Holmes does not appear in these agreements. The District Court found that these agreements had lapsed in 1954 but that "the folds in the industrial scene have remained even though the technical pressure of the legal instruments has been withdrawn" (CL 2, R 761). The Court also found that much of the pattern established under the 1907 agreements continued until this suit was brought (Finding 53; R 759).

The 1907 agreements show only that the continued operations of AFANY in only the three cities of Boston, New York and Philadelphia, grew out of an agreement under which there were cross licenses of patents. There were patent conflicts which were settled by the 1907 agreements (Grinnell Requests to Admit relating to patents, R 300; 494-495; Ex. 80-C, R 1380; see also Grinnell Brief, pp. 10-12).

AFADEL, formed in 1920, has, therefore, been held liable not for something done by a predecessor in title but rather for alleged illegal agreement of AFANY entered into thirteen years before AFADEL came into existence and became its parent. If the District Judge noticed this situation, he did not mention it. Actually from 1920 when AFADEL was organized, down to 1949, it had no affiliation with any other defendant.

Normally, this situation could not be deemed a proper predicate upon which to base civil liability for some act or omission of another party.

Nevertheless, the District Court has treated AFADEL as one of "the alarm company defendants" and concluded that AFADEL along with ADT and Holmes "during their growing period * * *" in several respects violated the restraint of trade provisions of Section 1 of the Sherman Act (CL 1; R 760). The Court then went on to further find that AFADEL along with ADT and Holmes engaged

in per se violations of Section 1 when they, being the recognized dominant enterprises in the CSPS industry, entered into the aforementioned written agreements allocating markets and classes of customers and fixing minimum prices for types of service (CL 2; R 760-761). The Court was presumably speaking of 1907 and earlier years but must have overlooked the fact that there is no evidence showing that AFANY (much less the later-to-be-born AFADEL) was ever associated in any way with Holmes, and according to the record it does not even come into any contractual relationship with ADT until the very day of the 1907 agreements. Also there was a complete lack of evidence indicating that AFANY was one of the most substantial and recognized enterprises in the industry.

In addition there was no evidence that AFADEL or AFANY entered into any agreements or arrangements fixing prices, minimum or otherwise. All that remains then are the 1907 cross-licensing agreements under which AFANY retained and obtained rights to use patents in the three cities. There was no specific finding as to the validity and effect of those particular provisions.

In any event the District Court recognized that the historical agreements had expired, and placed its findings and conclusions on alleged practices continued through habit (CL 3; R 761). The Court then went on to bolster its conclusions by reference to alleged price manipulation to forestall competition (*as to which only fragmentary evidence naming AFANY indicates at best an attempt to meet existing and active competition*), and to acquisitions (*of which neither AFADEL nor AFANY had any*), and dismantling acquired central stations (*a practice in which neither AFANY nor AFADEL was involved*).

Nothing in the record nor the well known history of AFADEL and AFANY justified their relegation into a group which the District Court designated as "the alarm company defendants" without differentiation or distinction.

The situation of both AFADEL and AFANY was a matter of judicial record from as far back as 1928.

In *Automatic Fire Alarm Co. of New York and Automatic Fire Alarm Co. of Delaware* v. *Commissioner of In-*

ternal Revenue, 13 B. T. A. 1195 (1928), the Board of Tax Appeals considered the history of these companies and found that AFADEL, the appellant here, was organized in 1920 as a holding company to take over stock of AFANY and investments held by it in other companies.

The operations of AFANY as conducted in 1944, and substantially unchanged at the time of the trial below, were admirably described in the opinion of Chief Judge Maris in *Automatic Fire Alarm Co.* v. *Bowles*, 143 F. 2d 602 (U. S. Emergency Court of Appeals 1944).

4. The History and Business of Automatic Fire Alarm Company of New York

AFANY operates one central station in New York, one in Philadelphia and one in Boston (R 634). The services provided by each of those central stations are confined to its own city and consist of central station fire alarm, sprinkler supervisory and valve alarm service (these latter being herein designated "SSWF"). Each of these stations operates locally and independently. In no case does the service extend across state lines. There was no evidence that AFANY had any national accounts, or that it did any national advertising. Its business is completely local. It sells nothing but local service.[7]

The District Court did not advert to the affirmative defense of AFADEL that its only operating subsidiary AFANY was engaged only in local and intrastate business, which is beyond the application of the Sherman Act (see footnote 6, p. 8, *supra*). Instead the Court seems to have relied entirely on blanketing AFANY into an alleged combination and conspiracy operating nationally in order to find the jurisdictional element of interstate commerce.

As outlined in the Grinnell brief (p. 12), there had been negotiations for renewal of the 1907 agreement as far

7. There is mention in the record of Reeve Electrical Co., Inc., a New York subsidiary of AFANY, originally acquired by AFADEL in 1927, and sold by it to AFANY in 1951 (R 633; 2321). Reeve sells bells and alarm equipment. Its products are available to all purchasers, and are not restricted to any particular use.

back as 1946 (R 567-569) but ADT had taken the position that a renewal would constitute unlawful exclusive dealing (Ex. 87; R 1425) and that it should be free to make its own actuating devices (Ex. 86; R 1421). The parties therefore negotiated toward a resolution of their rights on expiration of the agreement with the result that Grinnell sold its devices in place to ADT for 17½% of the revenue from applicable contracts at the 1954 rates (Ex. 89 dated December 29, 1952). At the same time Grinnell made a similar agreement with AFANY (Ex. 111 dated December 24, 1953; R 1523). After 1954 Grinnell received no revenues from any new contracts (Ex. 316; R 2337; R 684).

Thereafter ADT manufactured and installed all the equipment for installations on any new contracts which AFANY obtained for sprinkler supervisory or valve alarm service in the three cities (Tr. 721-722). After the expiration of the 1907 agreement, AFANY could do nothing about making new or different arrangements for servicing its sprinkler supervisory and valve alarm service contracts until agreement could be negotiated whereby AFANY could purchase all equipment installed in a customer's building by ADT. This posed many different problems which still persisted at the time of the trial below.[8]

5. Findings Made Without Any Support

In holding AFADEL liable as a part of a combination and conspiracy, the District Court did not stop to make specific findings as to particular acts on the part of AFADEL or AFANY.[9] In the mass of evidence offered by the Government, there was only a handful of evidence touch-

8. Since the trial below, AFANY and ADT have negotiated an agreement terminating all such arrangements, and providing for the purchase by AFANY of the equipment already installed by ADT, and the transfer of such service to AFANY's central stations. This agreement became effective in April 1965. The Department of Justice was advised of the terms of this agreement and the fact that it was intended to be executed and consummated. When the service was transferred, all division of the revenue between AFANY and ADT ceased.

9. The District Court promised to make findings keyed to supporting documents or testimony presumably in order to comply with Rule 52(a) but this was never done (R 340).

ing AFADEL, but the District Court had no concern for details of activities. This resulted in a number of findings as to AFADEL which were not only wholly unsupported but demonstrably untrue. In considering this characterization, it should be noted that most of the findings to which exception is taken involve this defendant only by implication and are due entirely to the District Court's insistence on lumping together wholly separate activities of the respective alarm company defendants and thus ascribing the acts of any one such defendant to each and every such defendant.

The following are examples of unsupported findings:

a. In Finding 4 (R 747) it is implied that AFADEL is a party to an enterprise which is nationally directed, national in appearance and reality, national in financing, selling and advertising, and national in purchasing of equipment and processes of management. There was no evidence that there was any national direction as far as the AFANY's three central stations were concerned. Indeed there was no evidence as to how those central stations were directed, if not locally. There was no evidence concerning financing, and none concerning selling. Similarly, there was no evidence of any national advertising, nor, in fact, of any advertising by AFADEL or AFANY. Equally lacking was any evidence on planning, or the purchasing of equipment in connection with the three central stations.

b. In Finding 6 (R 748) it was found by implication that AFANY made an installation charge to a customer and that in computing such charge it estimated cost of installation "plus overhead expenses and often expected profit". Actually, the evidence shows only that AFANY used an advance service charge rather than an installation charge (Ex. 298; R 2199). It does not show that AFANY calculated this charge so as to recover installation costs (R 640-641).

Actually, before there could be any complete recovery of total cost, overhead and profit, more would have to be taken into account than what the finding describes. Sales and installation are expenses incurred at the very beginning.

Leased wire costs and those of central station operation, inspection and maintenance continue throughout the contract period as does overhead. Overhead continues during the entire period; overhead and operating expenses must be recovered before it can be said that any profit is obtained.

The Government approach and the finding of the District Court completely overlook the aggregate of costs which had to be covered before any point of profit could be reached.

c. In Finding 9 (R 749) the District Court found that AFADEL provided CSPS by three units, one in each of three cities, in all of which there is CSPS competition. This finding ignores the fact that AFADEL provides no service whatsoever, and that AFANY is the company providing such service.

d. In Finding 11 (R 749) the District Court spoke of 33 other CSPS competing companies, and specifically found that each of 23 of these companies operated in one of 23 cities with competition from one or more of the alarm company defendants. It thus treated AFADEL as if it was broadly involved with 23 competitors in 23 cities. This ignores the fact already found in Finding 9 (R 749) that AFANY units were operating only in three cities, in all of which there was competition.

e. In Findings 12, 13 and 14 (R 749-750), the District Court found by implication that in New York, Philadelphia and Boston, customers have the option of using other systems, and in some cases change from one method to another, but that the preponderant shift is from other methods to accredited CSPS. The record is barren of evidence showing any such preponderance as far as those three cities are concerned. The implication that more customers shift to AFANY from companies providing other methods is likewise unsupported by any evidence.

f. In Finding 15 (R 750) the District Court found that in 1960 the alarm company defendants and all other CSPS companies obtained from manufacturers in various states

protection equipment worth over $12,000,000, and then cited a reply brief of the alarm company defendants as indicating that all this equipment was manufactured by the defendants "(presumably overwhelmingly by Grinnell)".[10] The implication is that AFANY obtained most of its equipment from Grinnell. The District Court went on in Findings 17 and 18 to assume that Grinnell is the principal supplier of the dominant companies (including the alarm company defendants) in the market and that Grinnell's primary motive when it acquired the controlling interest in AFADEL was to secure an assured outlet for part of Grinnell's manufactured products (R 750). The true picture is reflected in Grinnell's answer to Government Interrogatory No. 13 where it is shown that AFADEL's purchases (actually AFANY's purchases) from January 1952 down to July 1, 1961 were minimal, the smallest being $634.39 in the whole year 1955, and the largest being $3,731.61 in the year 1960, and it further appears that sales include replacements, and that the sales cover devices supplied for repair or replacement under the device sale agreement of February 18, 1954, as to which Grinnell ceased to have any obligation after February 18, 1959 (R 2341-2342). In view of the minor amount of sales involved, it is impossible to understand how the District Court could draw the conclusion that such sales suggest that a primary motive for the acquisition of control of AFADEL was to secure "an assured outlet for part of Grinnell's manufactured products".

g. In Finding 16 (R 750) the District Court implied that AFADEL participated in providing service to 900 subscribers, each located in a state other than the one wherein the servicing station was located. The same finding implies that AFADEL paid charges for interstate transmission of signals. There is, and there could be, no evidence that AFANY rendered or contracted to render any service outside of the state in which the servicing central

10. This finding is a glaring error. Grinnell was primarily a pipe fittings manufacturer. Its production of actuating devices was incidental, and ceased in 1961 (R 687).

station was located, *viz.*, New York, Pennsylvania or Massachusetts.

h. In Findings 21 through 24 (R 751-752) the District Court found that a personnel unity was achieved "through the dominant character of Mr. Fleming", the president of Grinnell, although all of the evidence indicated that Grinnell had never attempted to run either AFADEL or its operating subsidiary, and that it had left the management of those companies unchanged (R 690, 693).

i. In Finding 25 (R 752) the District Court found that there was a generic similarity in contract forms, price lists, and instruction forms used by the alarm company defendants, when in fact there was no showing of any common source, nor that the forms in question were any different from the general type of forms used by all protection companies in the field. The finding also overlooked the fact that there were definite differences in the respective forms used by ADT, Holmes and AFANY (*cf.*, Ex. Z-2, R 3673; Z-3, R 3677; Ex. 298, R 2199; Ex. 307, R 2229).

j. In Finding 26 (R 752) the District Court found by implication as to AFADEL that Grinnell officers and Mr. Fleming, its President, spent substantial time in travelling between the AFANY offices, and by this means and written communication, produced a high degree of control and integrated policies between AFADEL, ADT and Holmes. As to AFADEL, there is evidence that Grinnell officers sat on board of directors meetings at New York (R 690-691; 692), but there was no evidence of visits by them to Boston or Philadelphia. The finding of integration of policies is entirely an assumption without any evidence to support it. The evidence, to the contrary, indicates a complete lack of effort by Grinnell to direct and control the operations of either AFANY or AFADEL (R 693-694; 684; 690-691; 577). Furthermore, there was no evidence of any change in the pattern of operations of AFANY after Grinnell obtained the controlling interest in the stock of AFADEL.

k. In Findings 27 to 43 (R 753), the District Court found by implication that AFADEL was an integral part of a combination having a dominant share of an identifiably separate national market in accredited central station business. In so finding, the District Court ignored the competition which it recognized in Finding 9 (R 749), the fact that each of AFADEL's operating subsidiary's central stations was a separate and purely local operation confined to a particular city, and the fact that other forms of protective service having insurance accreditation were in actual competition with AFANY in all three cities. The District Court placed great emphasis on differences in class, such as a Volkswagen compared to a chauffeur-driven Rolls Royce, or a Corvair and a Cadillac, or a boardinghouse and a rated hotel (*cf.* FF 14 and 35; R 754; R 749). These findings created an artificial and unrealistic image of the field in which the operations of AFANY were conducted. In fact the Government made no serious attempt to show how AFANY operated.

l. In Finding 47 (R 756) the District Court found that a key factor in the violations by the alarm company defendants was that "because of their national operations, one or more of defendant alarm companies choose in some areas to operate at a loss". The very language used makes it impossible to determine whether this was intended to apply to AFANY. In any event, there is no evidence whatsoever that AFANY ever operated at a loss in any area.

m. In Findings 48 to 51 (R 757-758), the District Court found that acquisitions were an important source of the market power achieved by the alarm company defendants, and while referring specifically to acquisitions by ADT, the Court implied that there had been other acquisitions by "ADT or Holmes or AFADEL, if any" (FF 51; R 758). There is no evidence of any acquisitions by AFADEL either in or outside of the designated market, and it was not shown that AFADEL had any connection with any of the acquisitions of ADT.

In its final finding, Finding 55 (R 760), the District Court made a broad finding of anti-competitive acts on the part of the defendants collectively, such as quotation of cut prices, occasional installations without charge, "rarely, successive bids" progressively lower than standard rates, and "at least once" reduction of rates at all locations of a chain-business account to eliminate a competitor in one city, and "infrequently, the deferment of prompt payment of installation charges". The Court referred to these departures as sometimes merely meeting competitors' prices, but on rare occasions, as undercutting such prices. While this was a blanket finding as to all defendants (not just the alarm company defendants), the evidence upon which it was purportedly predicated did not relate to AFANY. No such evidence relating to Holmes has been noted, and admittedly Grinnell was never in the business of selling CSPS.

As far as AFANY is concerned, the only purported evidence of anti-competitive acts offered by the Government was seven pieces of paper. Exhibit 177 (R 1643) is a contract data report of ADT mentioning a contract for sprinkler supervisory and water flow service (SSWF) sold by the Boston office of AFANY in competition with Call's Signal Company on December 1, 1961. A single line states, "In order for us to secure the agreement we were only able to get $400.00". The report suggests that a competitor's price was met. It does not show that the competitor's price was undercut.

Exhibit 195 (R 1879) is an ADT competition report relating to a sale of burglar alarm service made by ADT at Long Island City, New York. The salesman's report indictates that "AFA [meaning AFANY] worked together" with him in negotiating the contract and that in order to obtain the contract it was necessary to waive the advance service charge. This relates to a burglar alarm-night watch contract. The document does not show what was happening on the companion sale being made by AFANY.

Exhibit 198 (R 1906) is an ADT contract data report relating to a sale of SSWF service at Philadelphia made by AFANY. The report shows only that the contract was

negotiated below standard rate "due to competition". The quotation involved waiving the advance service charge and quoting an annual service charge of $2,500 as against the competitor's quotation of $2,350. Presumably the competitor was quoting without an advance service charge.

Exhibit 267 (R 2120) is a report of an ADT salesman to ADT's executive accounts division relating to a proposed renewal of existing night watch fire alarm and manual fire alarm service at a plant in Philadelphia. The salesman was indicating that he did not expect to offer a reduced rate unless necessary. He mentioned that the competitor was expected to propose a contract with no advance service charge and a 20% reduction in ADT's rate in his proposal. In support of his position the salesman stated: "The Automatic Fire Alarm Company recently submitted and received renewal SSWF contracts for this location at the same rate presently in effect. In a discussion with Automatic Fire Alarm Company, it is suggested that we not increase the rate. However, it is not expected that we should offer a reduced rate unless necessary."

Exhibit 271 (R 2125-2127) is a memorandum from the district sales manager of ADT to its general sales manager reporting on negotiations with Lit Brothers stores in Philadelphia where a competitor seeking to take over existing ADT and AFANY services had offered a contract with no installation charge and an annual service charge 25% less than the rate under the existing contracts, and in addition had offered a personal guarantee of $100,000 to cover any failure of the competitor to deliver the service. The ADT salesman indicated that an effort was being made to meet the competitor's proposal (except as to the guarantee), but that a conclusion to the negotiations had not been reached.

The first piece of paper coming from the AFANY files was Government Exhibit 299 (R 2203-2205) which is in the nature of a competition report from the vice president in charge of the Boston office, dated September 4, 1958, reporting on efforts being made to meet competition. This report indicates that the competition was strong and successful.

It does not show that AFANY was undercutting the competitor.

The only other paper coming from the files of AFANY is Exhibit 246 (R 2090), a memorandum from an AFANY salesman at Philadelphia who was negotiating for a new SSS contract (which would be written by AFANY and installed and operated by ADT) in connection with efforts by Holmes to sell a burglar alarm service contract and efforts by ADT to sell temperature and boiler supervision (sometimes called industrial process or IP). The salesman reported that he was told that the competitor, Owl Company, had presented a proposal for all the services involved at a price about ⅓ less than AFANY's price for SSS and ADT's price for IP. The salesman closed the contracts for AFANY and ADT on being told to meet the competitor's price.

Written on the bottom of his memorandum is the notation that Holmes would not cut its prices and that Holmes lost the bid to a competitor (R 2091).

The incidents mentioned in Exhibit 246 do not seem to fit with anything mentioned in Finding 55 (R 760), unless they were thought to be included in those referred to: "Sometimes these departures have merely met the prices of competitors; but, on other occasions, rare though they were, the departures undercut or beat competitors' prices" (R 760). Actually in the incidents referred to in Exhibit 246, AFANY was merely trying to meet the competitor's bid.

These isolated incidents afforded no significant support for including AFADEL in a blanket finding of anti-competitive acts.

6. The Relief Granted Against Automatic Fire Alarm Company of Delaware

In the final decree, the District Court enjoined AFADEL with the other defendants, and all acting in their behalf, from further restraining trade or attempting or combining to restrain trade in the designated market, and from attempting to monopolize, or conspiring to monopolize, or

monopolizing that market (R 768). This injunction was implemented by a direction to file with the Antitrust Division of the Department of Justice all standard lists of prices and terms of sale or servicing as adopted from time to time, and also to file every quotation departing from such standard lists within two weeks of the quotation (R 768-769).

The decree further prohibits any acquisitions in the designated market, and as far as AFADEL is concerned, prohibits the employment after April 1, 1966 of James Douglas Fleming by defendant as an officer, director, employee, consultant, agent or otherwise (R 769). Mr. Fleming has been a director of AFADEL and AFANY. Insofar as the required removal of Mr. Fleming as a director is concerned, this mandatory injunction interferes with the free choice of the stockholders of AFADEL.

The decree constitutes an unjustified blanket injunction against any conceivable violation of the antitrust laws, thereby subjecting it and its subsidiary and their officers, directors and employees to the threat of contempt proceedings on any complaint regarding a future act or omission claimed to violate those laws. This type of decree has been disapproved in several decisions of this Court.

The price filing requirement imposes an onerous and expensive burden of filing prices, terms of contract and records of any deviating quotation regardless of circumstances, and thereby creates a public impression that the business of AFADEL and its subsidiary is being policed by the Department of Justice, and that any deviating quotation constitutes an unlawful act subject to serious penalties by enforcement of the decree itself. It improperly interferes with the ability of the personnel involved to act freely in meeting or creating competition, the very aim and purpose of the antitrust laws. At the same time, the added expense of compliance places AFADEL's operating subsidiary at a disadvantage in competing against non-defendant competitors, which are not so burdened.

The further ban on any acquisitions by AFADEL was imposed without any history of prior acquisitions by AFADEL or AFANY. This prohibition further restricts AFANY's ability to compete without any need being demonstrated for such shackles.

7. The Additional Relief Requested by the Government

The Government has appealed on the ground that the final decree does not provide adequate relief. In the complaint the Government sought, among other things, a direction that Grinnell divest itself of the stock of ADT. The decree directs not only the divestiture of Grinnell's stock in ADT, but also the disposal of its stock holdings in Holmes and AFADEL (R 769).

The Government now insists that the alarm company defendants should be required to limit themselves to one-year contracts, and further, that there should be a direction for compulsory sale of any protection equipment manufactured by the alarm company defendants, and further, that there be a compulsory assignment to subscribers of title to equipment installed in their premises, and finally, that the Government be given visitation rights as an adjunct to enforcement of the decree.

AFADEL and AFANY are not directly involved in the problem of the requests for divestiture, but they are vitally concerned with the other request for additional relief.

Any requirement for short-term contracts would upset the whole structure of the operations of AFANY. If there is no assurance of continuance of a contract beyond one year, AFANY would have to charge, in the first instance, all of its direct and indirect installation costs, field and office overhead and sales expenses (which has not heretofore been done), and to so price the service that all these items along with the cost of rendering the service itself can be recovered within one year.

With no such requirement imposed upon a competitor (and the District Court itself found that there was competition in New York, Philadelphia and Boston—see Finding

9; R 749), AFANY would be at an extreme competitive disadvantage.[11] Such a requirement could well drive it out of business in the face of competition from other companies having no such burden. Few, if any, prospective customers would be willing to spend so much money in the first year of service. Certainly most customers would prefer to accept the lower annual cost spread over a period of years, a basis which would be, and is, offered by competitors of AFANY. The relief requested would destroy AFANY's ability to compete with competition not under any similar judicial restriction. In any event, the trial judge did not see fit to grant any such relief.

As to the request for compulsory selling of protection devices to all comers, neither AFADEL nor its operating subsidiary, AFANY, are involved in the manufacture of such devices. It is true that AFANY's subsidiary, Reeve Electrical Company, Inc., has been assembling and selling bells and alarm equipment which can be used in CSPS, but there was no evidence that Reeve ever refused to sell any of its products to anyone.

The Government's argument was that the advance service charge made by AFANY covered the cost of installation, and that having paid for such cost, the customer should be given title to the equipment. This, it was argued, would give the customer more ready access to competitors at the time that his CSPS contract was up for renewal. There are several answers to this argument. First, it was not shown that AFANY's advance service charge is intended to, or does in fact, cover all the cost of providing and installing the equipment.[12] Secondly, inspection and maintenance, and possible repairs and substitution of parts are

11. Lavino of Sentinel Corporation, an AFANY competitor, at Philadelphia, testified that he needed a five year contract and hoped to break even in three and one half years (R 2845, 2853).

12. Lavino of Sentinel Corporation, a Government witness, testified that the installation charge asked for at the beginning of service does not cover all costs, and that even with payment in advance of the first year's annual service charges, his company was "still behind rather substantially financially" (R 2847). See also footnote 11, *supra*.

necessary to maintain the integrity of the service. Obviously, one having title would be the best one to inspect, maintain and repair the equipment. Thirdly, the security of the system is vital, and any tampering could imperil the whole purpose of the service. Finally and perhaps most important, it is a condition of insurance accreditation imposed by the underwriters that the equipment be owned, inspected and serviced by a CSPS company.[13]

The standard of the National Board of Fire Underwriters for the installation, maintenance and use of central station protective signaling systems provides in Chapter 1, Article 100 (Ex. 1; R 792):

> "Central Station System. A system, or group of systems, the operations of which are signaled to, recorded in, maintained and supervised from an approved central station, in which there are competent and experienced observers and operators in attendance at all times whose duty it shall be, upon receipt of a signal, to take such action as shall be required under the rules established for their guidance. *Such systems shall be independently owned, controlled, and operated by a person, firm, or corporation whose principal business is the furnishing and maintaining of supervised protective signaling service and who have no interest in the protected properties.*" (Emphasis supplied.)

As to the Government's request for a decree provision granting visitation rights, it is obvious that the small position occupied by AFANY fails to justify the harassment and expense implicit in visitation rights. As the decree now stands, the Government can bring contempt proceedings to enforce the judgment if necessary. There are no circumstances present which would make it important for the Government to be able to engage in policing operations

13. McDowell, President of Central Station Signals, Inc., a New York competitor of AFANY, a witness for the Government, testified that his company always retained title to the equipment because of fire insurance underwriters' requirements, and also because of the necessity to replace or repair equipment (R 2899-2900).

at will. As the District Court itself said, "this is not a big case in any sense" (R 764), and elsewhere "all that is at stake here is the rooting out of a plant of minor importance in the rich forest of the American economy * * *" (R 764). In the absence of a showing that this refusal constitutes a clear abuse of the trial court's discretion, such additional relief should not be granted.

Summary of Argument

1. As to the Defendants' Liability

Apart from procedural and constitutional objections arising out of the trial judge's conduct of the proceedings below depriving the defendants of their right to a fair trial and due process, after the trial the trial judge constructed in his decision a new rule of law that on the mere showing of the relevant market and the holding of a predominant share therein, a presumption of unlawful monopoly immediately arises, and the burden of proof thereupon shifts to the defendants requiring them to prove their innocence. The trial judge then went on to find, without evidentiary support, a superficial generalization of facts, upon which he stated that the defendants did not and could not meet this burden. Thus, in effect, the trial judge ruled that the holding of a predominant share in the relevant market is a per se violation of Section 2 of the Sherman Act.

Admittedly the trial judge was attempting a new advance in antitrust jurisprudence which he seemed to think this Court ought to follow by this time.

AFADEL does not attempt to repeat the detailed argument made by Grinnell challenging the propriety of the proceedings below. AFADEL adopts those arguments as being particularly applicable to its situation in view of the complete lack of evidence showing that AFADEL had any significant part in the alleged relevant market. Taking that market on a national basis (which is wholly inapplicable to a defendant connected with only three separate

local operations of a subsidiary wholly within state lines) AFANY's alleged share was only 2%. It was thus saddled with a secret burden of proof during the trial because ADT had a large percentage in an alleged national market in which AFANY never really participated.

Under the decisions of this Court thus far the Government has the burden of establishing an intentional violation of Section 2 in order to impose liability under it. In the opinion below there was no pretense of pointing specifically to any acts of intentional monopolization on the part of AFADEL or any activities going in the direction of maintaining or retaining a monopoly position. In fact, there was nothing from which an intention to monopolize could be inferred.

Indeed, the trial judge was not interested in hearing about or examining into what AFADEL did. He condemned attempts by the Government to show prices, or production, or selling, or leasing, or marketing, or financial policies as a needless waste of time (R 746). He treated the three alarm company defendants as a group without stopping to find whether any particular activity was actually carried on, or participated in by AFADEL. Any inference of a questionable activity on its part, as far as the opinion is concerned, is entirely a matter of blanket inference.

The entire decision below is predicated upon a novel but erroneous rule of law to begin with, and this rule of law was not brought home to AFADEL in its application because of the complete lack of findings of fact under which the District Court's new rule could be invoked against AFADEL.

The application of this new rule to AFADEL is immediately questionable because the trial judge's designation of the relevant market was invalid. This point has been briefed in detail by ADT. To the extent that ADT's argument is applicable to the limited field in which AFADEL's subsidiary, AFANY, operated, *viz.*, the separate cities of New York, Philadelphia and Boston, AFADEL fully

adopts ADT's presentation of the argument. In those three cities AFANY admittedly encounters strong competition not only from other central station operators, providing fire alarm and sprinkler supervisory and valve alarm service, but also from suppliers of every other type of protection service such as Watchman Service, Manual Fire Alarms, Auxiliary Fire Alarm, Local Fire Alarm Service, etc.

Without a proper designation of the truly relevant market, no appraisal can be made from which any sound determination of an allegedly predominant position could emerge.

In addition to the arguments made by Grinnell and ADT, AFADEL has raised its own basic jurisdictional objection in that the Government failed to show that its only operating subsidiary, AFANY, was engaged in interstate commerce or in any activity having any substantial effect on interstate commerce. The trial judge brushed aside any consideration of this objection because he blanketed in AFANY with the other defendant alarm companies as part of a national picture. He relied upon the use of interstate telephone lines (*which has no application whatsoever to AFANY*), the holding of national accounts (*AFANY had none*), national direction of operations (*and there was no evidence of this as far as AFANY was concerned*) and the fact that "the enterprise in appearance and reality, in financing, selling, advertising, purchasing of equipment, processes of management, and over-all planning is national" (*and there was no evidence as to AFANY in regard to any of those except the inference that equipment might be shipped across state lines*). Lack of interstate commerce is a complete answer to the whole case as far as AFADEL and AFANY are concerned.

AFADEL has been held liable for violation, not only for monopolization under Section 2 of the Sherman Act, but also for a restraint of interstate commerce and violation of Section 1. As already noted, there is a complete lack of evidence and even of findings as to practices in restraint of trade which might be considered to be evidence

of a violation of Section 2, but the same situation exists in regard to the holding of a violation of Section 1.

AFADEL was not shown to be doing any business. It was simply a holding company. The operations of its subsidiary, AFANY, were never shown in enough detail to establish any wrongful act. The most that can be said was that it was shown that in 1907, thirteen years before AFADEL was organized and obtained control of AFANY, the latter was a party to agreements settling patent differences, and by which AFANY obtained a clear license to operate its fire alarm business in the cities of New York, Philadelphia and Boston. In the same contracts it cross-licensed other parties to use its patents elsewhere, and obtained an arrangement under which it could promote and sell contracts for sprinkler supervisory and valve alarm service to be installed and operated by ADT using in part certain devices manufactured and supplied by Grinnell. ADT thus became a subcontractor.

Concededly those arrangements expired long before the present suit was commenced, but the trial judge predicated his findings upon the continuance of the arrangements as a matter of habit in the years before this action was instituted. He seems to have ignored or failed to notice that prolonged efforts were made to negotiate a settlement of terminal rights under the lapsed agreement and that these were unresolved even at the time of trial. The decree is therefore predicated entirely on an unresolved situation existing in the years before the suit was commenced rather than on the 1907 agreements. This situation alone was found to be an antitrust violation, and this was not buttressed by any specific findings of predatory practices on the part of AFANY. All that was shown was that AFANY was encountering and endeavoring to meet stiff competition in New York, Philadelphia and Boston. The holding that AFADEL thereby violated Section 1 of the Sherman Act was wholly unjustified.

2. As to Relief Granted

The final decree purports to set up strong measures to eliminate the effects of restraint of trade activities on the part of AFADEL and to restore competition. As already noted, AFANY had enormous competition, and it was not shown to have been engaged in any restraining activities. The injunctive provisions start with a complete ban on any future violation of antitrust law without any attempt to point to the particular types of activities intended to be restrained. This form of decree has long been considered improper as subjecting every activity of a defendant to a threat of contempt proceedings.

The decree goes on to require AFADEL (and presumably AFANY) to file with the Antitrust Division standard lists of prices and terms of sale for servicing, and any changes therein as well as a report of any quotation, written or oral, departing therefrom. The purpose of imposing this onerous burden is unclear because it is accompanied only by a hint or threat that any deviation causes AFADEL and AFANY and all acting for them to run the risk of being punished for "invidious, illegal discrimination." Implied threats or hints are hardly the proper form of an injunction enforcible by contempt proceedings.

Although there is no evidence indicating that either AFADEL or its subsidiary is engaged in the sale of any commodity or product, the opinion and the form of decree hint that AFADEL may be confronted with some new rule of law yet to come, threatening to penalize it for any variation in prices or terms of contract for the rendering of services. The price filing requirements of the decree have a particularly damaging effect in suggesting to customers and the public in general that all of AFANY's operations are being policed by the Department of Justice. There was no hint of any reason why the trial judge found it necessary to create this public impression in order to accomplish the purposes of the Sherman Act.

The decree also prohibits any acquisition of stock, assets or business or enterprises in the designated market.

This provision is made against AFADEL without any history of any previous acquisitions and can only prevent AFANY from being in the same position as its active competitors in the event that any business or assets usable in central station protection service are offered for sale. In the absence of a clearly established monopoly on the part of AFADEL or of wrongful acquisitions in the past, this relief is punitive and unnecessary.

The decree goes on to make the amazing direction that AFADEL (and presumably AFANY) never employ or continue to employ James Douglas Fleming, the president of Grinnell, in any capacity. Mr. Fleming has been serving as a director of AFADEL and its subsidiary. He was not shown to have had active participation in the day to day operations of these companies. Grinnell does not hold all of the stock of AFADEL. There are a minority of stockholders to the extent of 11%. This requirement of the decree deprives it and its stockholders of their freedom to choose Mr. Fleming as a director, if they should choose to do so. It also deprives them of any right to enjoy his services or counsel, if they wish to do so. This requirement is wholly unwarranted.

3. As to the Government's Appeal

Because of the cross appeals in this case and the desire of counsel to limit the number of briefs, this brief includes a statement of AFADEL's opposition to the Government's appeal. The Government, being dissatisfied with the extent of relief granted by the trial judge, seeks a revision of the decree affording the Government additional relief against the defendants.

As concerns AFADEL (and AFANY) the Government seeks additional provisions requiring compulsory sale of equipment manufactured by them. Neither AFADEL nor AFANY manufactures any equipment. Although passing mention was made of Reeve, a subsidiary of AFANY, that company only manufactures bells and minor equipment,

which it sells to all comers. The request for a requirement of compulsory sale is therefore factually inapplicable to both AFADEL and AFANY.

The Government also seeks to bar AFANY from making service contracts having a term of more than one year. This request presumably stems from a desire to make the customer available for solicitation by competitors every year.

AFANY, like all its competitors, uses a contract having an original term of five years. Any change in this arrangement would interfere with AFANY's pricing structure. It has no installation charge. It uses an advanced service charge which does not cover the cost of the installation and overhead. It is necessary to have a longer term than one year in order to recover not only the cost of installation and operation but also overhead and profit.

At least one of the competitors testified that a five year contract was necessary, and that his company still had a considerable unrecovered investment at the end of three years. The provision requested by the Government would destroy AFANY's ability to compete and would soon drive it out of business. There was no evidence that any customer would want a one year contract under which AFANY would have to recover its entire cost, overhead and profit. Obviously, customers would prefer to spread that cost over a period of years.

The Government also seeks visitation rights in order to police compliance with the decree. The necessity for such rights was not demonstrated. AFANY operates only in three separate communities wherein any violation would quickly come to light. The requested provision would only harass AFANY and place an expensive burden upon it.

POINT I

The District Court erred in holding that upon proof of the relevant market and the holding of a predominant share thereof, a presumption of unlawful monopoly arises, thereby shifting the burden of proof to the defendants, and requiring them to prove their innocence.

The admittedly novel ruling below was made in a post-trial opinion (R 746). The defendants' counsel were not apprised in advance of this departure, and naturally took no steps to meet this unknown burden. In fact, the District Court stated that it would be a rare case where this burden could ever be carried (R 745). A little later the District Court stated: "Enough has been noted to see why it is that the defendants have not borne, and cannot bear the burden of showing that their proportion of the market is a mere tribute to their perfect performance" (F 51, R 758). Thus, in effect the Court held that for all practical purposes, the predominance found in this case is a per se violation since as a practical matter the presumption could not be rebutted. This ruling is the real cornerstone upon which the whole decision below depends.

Section 2 of the Sherman Act, like all criminal statutes, has the elementary requirement of proof of intentional violation. While this intent has been inferred from acts and circumstances, no other Court has thus far eliminated the necessity for a properly supported finding of deliberateness. The decision below goes to the other extreme in imposing on the defendant the affirmative burden of proving that he had no intent to violate the statute, and that the circumstances under which he acquired or maintained the alleged monopoly were innocent.

This Court has consistently adhered to the rule that the plaintiff in a monopolization case has the burden of establishing intentional violation of the statute.

See:

Times-Picayune Publishing Co. v. *United States,* 345 U. S. 594 (1953);
United States v. *Griffith,* 334 U. S. 100 (1948);
Schine Theatres v. *United States,* 334 U. S. 110 (1948);
United States v. *Paramount Pictures,* 334 U. S. 131 (1948);

The trend prior to the decision appealed from has been that the offense of monopolization depends first upon proof of monopoly power, *i.e.,* power to control prices or to exclude competitors, and that even with such proof the plaintiff must show more. For example, monopoly power has been considered unlawful when it was acquired or maintained by restraints of trade in violation of Section 1, or by specific acts from which an intention to exclude competitors could be inferred.

See:

United States v. *United Shoe Machinery Corp.,* 110 F. Supp. 295 (Wyzanski, J., D. Mass. 1953), *aff'd per curiam,* 347 U. S. 521 (1954);
United States v. *E. I. du Pont de Nemours & Co.,* 351 U. S. 377 (1956).

The District Court here plainly indicated that it considered the rule which it enunciated after the trial as a departure long overdue. Speaking of the presumption which it had adopted, the District Court stated (R 746):

"* * * To this Court it appears that the day has come for it, and more important for Counsel, to proceed on the acknowledged principle that once the Government has borne the burden of proving what is the relevant market and how predominant a share of market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of §2."

The District Court went beyond the point of recognizing the new-found presumption as shifting the burden of going forward, and expressly held that the new presumption shifted the burden of proof (R 746). Having thus imposed by its post-trial opinion a retroactive shift of the burden of proof to the defendants, the District Court went still further and indicated that as a practical matter, the defendants then had an impossible burden. The Court stated that "it is the highly exceptional case, a *rara avis* more often found in academic groves than in the thickets of business, where monopoly power was thrust upon an enterprise by the economic character of the industry and by what Judge L. Hand in *Aluminum* called 'superior skill, foresight and industry' " (R 745-746). Going even further, the District Court found that the informed observer is left with the abiding conviction that non-statutory monopolies are "to a moral certainty, due to acquisitions of competitors or restraints of trade prohibited by §1" (R 746).

By this route the District Court actually reached a point where it made the simple fact of dominance in what it deemed to be the relevant market a per se violation of Section 2. The practical presumption adopted below is, therefore, the equivalent of this Court's adoption of presumptions of per se violations in price-fixing cases under Section 1 (*cf. United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397 (1927); *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150 (1940)).

This new doctrine adopted by the District Court below was all the more surprising because it was not suggested by the Government counsel, who was at great pains to try to prove specific intent, only to be admonished in the opinion that most of his work was unnecessary and wasteful. The Court said (R 746):

> "* * * The Government need not prove, and in a well-conducted trial ought not to be allowed to consume time in needlessly proving, defendant's pricing or production, or selling, or leasing, or marketing, or financial policies while in this predominant role."

Even if the novel presumption constructed by the District Court after the trial below were to be accepted as a rule, it should not be applied in the present case because trial counsel on both sides were not aware of this impending departure, and the defendants could not have known the burden which they were to be called upon retroactively to sustain. Apart from the present unfairness, the new doctrine is dangerous. It would make a monopolization case a pure matter of statistics. It would require a defendant to prove his innocence rather than to meet proof, either direct or circumstantial, of an intentional violation of a criminal statute.

In monopolization cases, it would effectively end the ancient principle that a defendant is presumed to be innocent until proved guilty.

POINT II

The District Court's inference of illegal monopolization is erroneous because its designation of the relevant market was invalid.

Even if the new rule of law discussed under Point I, *supra*, were to be upheld, the presumption of illegal monopolization still depends upon the designation of the relevant market and a finding that the defendants have a dominant share of that market. The necessity of first ascertaining the true relevant market in a monopolization case is well settled.

See:

United States v. *Columbia Steel Co.*, 334 U. S. 495, 510, 519 (1948);
United States v. *Griffith*, 334 U. S. 100 (1948);
United States v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956);
Times-Picayune Publishing Co. v. *United States*, 345 U. S. 594, 612 (1953).

In this case the District Court found as a fact that the relevant market was "the business of supplying and installing protection devices on the premises of subscribers, maintaining such devices and furnishing to subscribers protection from fire, burglary, or other hazards through central stations accredited for such service by insurance inspecting and rating organizations" (FF 43; R 755).

In proceeding to find alarm company defendants' shares, or their dominance in that designated market, the District Court used national statistics (FF 44, 24, 16, 7-11; R 756; 752; 750; 748-749). The Court did not specifically mention AFADEL's share. It was stipulated that on the national basis AFANY's share was approximately 2% (R 2266, 2268).

The brief of ADT deals extensively with the errors of the District Court in determining the relevant market and the extent of dominance in that market. AFADEL relies upon the ADT brief without attempting to repeat its arguments here. It is necessary, however, to point out special considerations applying to the particular situation of AFADEL.

As the District Court itself found, AFADEL (which must mean the operating subsidiary, AFANY) had only three central stations, each one located in a different city, *viz.*, New York, Philadelphia and Boston, and in each one of those cities there was CSPS competition (FF 9, 749). The District Court made no specific findings to indicate the exact extent of that competition, but concededly it was active and substantial.

The Court found that total charges for CSPS provided by ADT, AFADEL and Holmes to 93,272 subscribers located in 35 states and the District of Columbia amounted in 1961 to $57,000,000 (FF 24; R 752). The District Court gave no indication of having considered how many of those subscribers were in the three cities served by AFANY, nor the total number of all subscribers in those three cities purchasing CSPS or any kind of protection service. Thus, there is no finding of AFANY's relative position in the only

localities in which it operated, and where admittedly it had real competition.

In any event, AFADEL with only 2% of a falsely assumed national market, had but a minimal share not shown to constitute a local monopoly or to have any national implications.

The findings of the District Court erroneously threw AFANY into a national market which does not exist and in which AFANY had no occasion to participate. AFANY's operations at New York, Philadelphia and Boston were entirely local. The competition which it faced in those three cities was local. In addition, that competition was not just one or more central station operators, but every firm supplying any kind of fire alarm service as detailed in the ADT brief (Findings 12, 46; R 749, 757).

Separate local operations in three separate cities in three separate states are a far cry from a national picture. AFANY can hardly be considered to be in the same market as central stations in California, or in Texas, or in Louisiana, or in Florida. It was only by adding AFADEL into a broad picture with ADT, which operates in 115 cities in 35 states and the District of Columbia, that there could even be a pretense that AFANY was involved in a national picture.

If the matter is considered from the point of view of a subscriber, or a potential subscriber, the field in which competition exists is in the immediate vicinity, that is, within the city where the central station operates. The District Court recognized the fact that CSPS, at present, involves customer concentration within specific areas, and that a radius of 25 miles from the station marks the outer limit of service (FF 3, 4; R 747).

For these reasons and for the general reasons outlined in the ADT brief, the designated market selected by the Court as the relevant market in this case was completely unrealistic as far as AFANY's operations were concerned.

Obviously, if the real market were determined (and this would undoubtedly take much more evidence and greater study than appear in the record in this case) the relevant market in regard to any charge of monopoly by AFANY

was its immediate customer market in the separate cities of New York, Philadelphia and Boston, and that market includes every kind of service providing fire protection, regardless of whether a central station is involved or not, and also regardless of whether there was insurance accreditation.[14]

Furthermore, the service provided by AFANY was not confined entirely to insurance accredited locations. Many customers, for their own reasons, do not seek insurance accreditation. Perhaps some of them are self-insurers. One reason why some subscribers cannot be accredited is that alarm service is frequently provided to only a portion of a building, whereas insurance requirements for premium discounts usually require that the protection be extended to the entire building. None of these matters were examined into by the District Court.

As concerns AFADEL and its operating subsidiary, AFANY, the District Court's findings of the relevant market and the share of AFANY in that market were unsupported and clearly erroneous, and there is no finding nor is there any proof of AFANY's share in the true relevant market.

POINT III

None of the activities of Automatic Fire Alarm Company of Delaware's operating subsidiary was in interstate commerce, and none had any substantial effect on interstate commerce.

There is no evidence that the service provided from any of AFANY's three separate central stations at New York, Philadelphia and Boston, respectively, crossed state lines. Similarly, the record is wholly devoid of any evidence that AFANY was engaged on a national basis, or that it was

14. The list of insurance accredited central stations submitted to the Trial Court does not list AFANY (Ex. 305; R 2222). There is no question, however, that its three central stations were so accredited.

advertising on a national basis, or that it had any national accounts (*cf.*, FF 4; R 747).

It was only by erroneously blanketing AFADEL into a false national picture that there could be any pretense that the local businesses of AFADEL's subsidiary in the three separate cities were in interstate commerce, or had any effect on interstate commerce. There is still a basic requirement that an alleged violation of the Sherman Act must have occurred in interstate commerce, or have had a substantial effect on interstate commerce, before jurisdiction under the Act exists.

See:

Evanston Cab Co. v. *City of Chicago*, 325 F. 2d 907 (7th Cir. 1963), *cert. den.*, 377 U. S. 943 (1964);
United States v. *Yellow Cab Co.*, 332 U. S. 218 (1947);
Page v. *Work*, 290 F. 2d 323 (9th Cir. 1961), *cert. den.*, 368 U. S. 875 (1961);
Lieberthal v. *North Country Lanes, Inc.*, 332 F. 2d 269 (2d Cir. 1964).

Having in mind the Government's complaint that the defendants retain title to the equipment, and only sell service, any notion that AFANY is engaged in interstate commerce or does anything affecting interstate commerce has to depend entirely upon the idea of a nationally controlled combination; otherwise the interstate commerce element would have to be predicated upon the mere use of the mails or the sending of communications from one office to another, or the transmission of money, or some such other purely intracompany activity. If the latter alone is ever to be held sufficient to place AFANY in the stream of interstate commerce, there is hardly any business activity in the states which could be excluded.

As stated in *Harder* v. *Anderson*, a Fair Labor Standards Act case, 173 F. Supp. 135, 139 (D. C. Minn. 1959):

"The mere use of the United States Mails does not constitute engagement in commerce. It would be im-

possible to find a modern business of whatever size that does not use the mails to a considerable extent; i.e., invoicing, rendering of statements, collection of accounts, banking and many other facets of the day to day operations of such a business are absolutely dependent upon use of the mails. If use of the mails constitutes engagement in commerce then every local enterprise of the smallest scope is engaged in commerce and the owners and proprietors of those enterprises must consider their employees covered under the Act. It is clear that Congress did not extend the coverage of the Act so far. See, e.g. Kirschbaum v. Walling, supra. In considering this point, Judge Learned Hand stated in speaking for the Court in Bozant v. Bank of New York, supra, 156 F. 2d at page 789:

> "'* * * Indeed, were it otherwise, the Act would sweep into its maw every business, however local, which manufactured nothing whatever, merely because it was carried on by correspondence, which is the case with all business. * * *'"

AFANY's operations were not shown in any detail in the Government's proof here, but it is clear that those operations nowhere approach the scope and extent of the interstate activities found sufficient to sustain the jurisdictional element in *United States* v. *Shubert*, 348 U. S. 222, 226, 231-234 (1955) and *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944).

Neither the District Court nor the Government has expressly suggested any such stretch in the reach of interstate commerce. This basic jurisdictional element is clearly lacking not only as to AFANY, the operating subsidiary, but also as to AFADEL itself, which was not engaged even in purely local activity. AFADEL never did any business with third parties, much less engage in trade or commerce. (See: *Automatic Fire Alarm Company of Delaware* v. *Bowers*, 51 F. 2d 118 (D. C. N. Y. 1931).) And yet it is AFADEL, and not the subsidiary AFANY, which is the defendant in the present case.

POINT IV

The District Court's findings that Automatic Fire Alarm Company of Delaware restrained and monopolized interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act were unsupported and clearly erroneous.

In order to reach the conclusion that AFADEL can be guilty of restraint of trade and monopolization starting with agreements as far back as 1904 (FF 51a; R 758), the Court had to ignore (1) the lack of agreement, connection or affiliation between AFADEL and Holmes; and (2) the origin, nature and purpose of the original working arrangement between AFANY and ADT, entered into thirteen years before AFADEL was incorporated, and made at a time (1907) when local activities and patent settlements were not yet imagined to have Sherman Act implications. The Court must have also overlooked the fact that after the 1907 agreement expired in 1954 there were serious problems of terminal rights between AFANY and ADT with the result that AFANY had no option but to continue with existing arrangements relating to service at locations covered by existing contracts with subscribers. It could hardly be said that continuation of existing arrangements is a mere matter of habit and at the same time a deliberate persistence in something which Courts later came to consider an antitrust problem.

Having these factors in mind, the ultimate conclusion of the District Court falls unless the aggregate acts of the other alarm company defendants can fairly be imputed to this defendant.

Earlier in this brief (pp. 14-22, *supra*) there is a detailed outline of findings expressed or implied as to AFADEL or AFANY which are unsupported and clearly erroneous.

With all the obstacles of history in this case, it is impossible to rely on business patterns or folds in the industrial scene as the District Court did here in order to find

illegal restraints of trade and monopolization on the part of AFADEL (FF 51a, CL 3; R 758, 761). Whether the erroneous findings be treated separately or in the aggregate, the entire conclusion that AFADEL was guilty of illegal restraints and monopolization is unjustified.

POINT V

The proceedings below deprived Automatic Fire Alarm Company of Delaware of its right to a fair trial and due process.

In order to avoid repetition, AFADEL relies upon the argument and the authorities set forth in the Grinnell brief, Point I. Beginning with the fact that AFADEL was forced to trial without an adequate opportunity to complete trial preparation, and compelled to proceed before a trial judge who had plainly indicated that he had already formed an opinion of the case on the merits, but nevertheless refused to disqualify himself, and then repeatedly indicated his antagonism toward the defendants and their counsels' efforts to defend the case, and then continuing through the fact that the defendants were required to proceed blindly against a new and revolutionary doctrine first announced in the Court's decision by which they were later held to have had to sustain an impossible burden of proof, and ending with the fact that an unjust and unfair decree was granted against it, AFADEL was subjected to such novel and unfair proceedings that it was deprived of a fair trial and due process.

In addition, the manner in which offers of evidence and objections thereto were handled was equally unfair and left AFADEL's trial counsel in a position where he was required blindly to proceed against a mass of paper without knowing which documents or excerpts of depositions would actually be accepted or rejected by the Court. The entire Government case was submitted in less than one hour, during which the Government's documentary case was received en masse without a single witness being called.

It is true that the trial judge indicated at the third page of the trial transcript that he was satisfied from his examination of the documents that a prima facie case had been made for admissibility on the conspiracy theory (R 327). It is also true that, having overruled all objections at the sixth page of the trial transcript (R 330), the Court heard argument from defense counsel concerning receipt in evidence of excerpts of transcripts of depositions and then made an extended statement indicating why defense counsel's objections were being overruled (R 339-345). Nevertheless, the Court indicated that it would ultimately show in its decision the particular documents or other excerpts or pages of the transcripts giving support for its ultimate findings, conclusions and judgment (R 340). This was never done beyond incidental references to particular agreements.

The result is that defense counsel could not know during the course of the trial what portions of the Government's evidence were actually being accepted by the Court and therefore had to be met, or what portions would be rejected by the Court (if, indeed, any were) and which accordingly could be ignored as far as defense presentation was concerned.

Thus, defense counsel had to proceed blindly against a vast quantity of unknown items of evidence in the mass before them and to carry an as yet unknown burden of proof. This situation made the trial, which the trial judge had indicated that he considered an unnecessary ceremonial act, a doubly unfair proceeding bereft of any pretence of affording the defendants a fair and orderly hearing, or anything resembling due process.

Apart from the foregoing broad objections to the entire trial proceeding, there is still the question of the sufficiency of particular evidence in the great mass of documents and excerpts to support the charges made against AFADEL. The insufficiency of evidence to support specific findings has been set out in detail (pp. 14-22, *supra*). Without attempting any further repetition here, AFADEL respectfully contends that there was, in fact, no evidence to

support the findings of violations of the Sherman Act made and implied against it. Such insufficiency of evidence alone warrants a dismissal of the complaint against AFADEL, but even if this Court does not so hold, the trial proceedings were so prejudicial that at the very least this Court should remand the case for trial before another judge under appropriate protective instructions.

POINT VI

The relief granted was an unwarranted abuse of the District Court's discretion.

The final decree grants the plaintiff the following affirmative relief as to AFADEL (R 768):

1. It broadly enjoins "further restraining trade, or attempting or combining to restrain trade" in the designated market, and "further attempting to monopolize, or conspiring to monopolize, or monopolizing" that market.

2. It requires AFADEL to file with the Antitrust Division of the Department of Justice its standard lists of prices and terms of sale or servicing, as well as a record of any quotation, written or oral, departing from those lists (R 769).

3. It prohibits any acquisition of stock, assets or business of enterprises in the designated market.

4. It broadly enjoins AFADEL from employing or continuing to employ James Douglas Fleming, the president of Grinnell, as an officer, director, employee consultant, agent or otherwise after April 1, 1966. (Mr. Fleming has served only as a director of AFADEL and AFANY (R 2319-2320).)

In addition, AFADEL is indirectly involved in the direction of the decree that the appellant Grinnell file a plan

of divestiture under which it shall dispose of all its stock in each of the alarm company defendants (R 769). The decree provides that at the election of Grinnell, the plan may provide for sale of the stock, a distribution to Grinnell shareholders, or for some combination or reasonable variation of the two methods. One consequential effect of this provision on AFANY doubtless is that existing and prospective subscribers will feel uncertain as to the policies which come with new ownership.

This damaging and irreparable effect, coupled with the impression engendered by the price filing requirements of the decree that all the activities of AFANY are being policed by the Antitrust Division of the Department of Justice, places AFANY in a seriously disadvantageous position in attempting to carry on its business, and properly to compete in the highly competitive localities in which it operates.

When these disabling effects coupled with the Court's stated intention to be severe are added to the broad injunction against any conceivable violation of the Sherman Act, it will be impossible for AFANY to carry on its operations in any normal way. To use the words of this Court's decision in *Hartford-Empire Co.* v. *United States,* 323 U. S. 386 (1945), "the whole conduct of the defendants' business [is put] at the peril of a summons for contempt."

While the decree stands, every present and future employee of AFANY will feel himself subject to the threat of contempt proceedings whenever he is dealing with subscribers or prospective subscribers in relation to the necessarily varying costs of installation, maintenance and operation of fire or water flow alarm service.

A final decree in an antitrust case should clearly specify the conduct or practices intended to be prohibited so that any individual to whom it is or becomes applicable can reasonably determine whether any particular course of conduct will or will not constitute a violation punishable as a contempt of Court.

Cf., Schine Theatres v. *United States,* 334 U. S. 110, 125-126 (1948);

See also: *Standard Oil Company of New Jersey* v. *United States*, 221 U. S. 1 (1911);
New York, New Haven, & Hartford Railroad Company v. *Interstate Commerce Commission*, 200 U. S. 361 (1906).

In the present case, the District Court itself mentioned "modern judicial susceptibilities, and increased awareness of the rights of prospective defendants to clear warning of what constitutes criminal conduct" (Introduction to Decision, R 744-745). The District Court was referring in that connection to the reason for the adoption of the so-called "per se" rules in price fixing cases.

The whole decree goes far beyond any pretended prophylactic purpose, and creates an impression of punishment.

It is well settled that in a civil proceeding the Court has no power to punish antitrust violators, and that affirmative relief in such cases must not be punitive.

See: *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 326 (1961).

Implicit in the price filing requirements of the decree is the threat of punishment for "invidious, illegal discrimination" by a departure from the current standard. This suggests that the District Court is intending to import into the decree some as yet unstated prohibition in regard to cases where AFANY has to make a quotation lower than its standard price in order to meet a lower bid of a competitor.

Apart from the vagueness of the use of the words, "invidious" and "illegal." it should be noted that AFANY sells a service rather than a commodity.[15] In this light

15. *Automatic Fire Alarm Co.* v. *Bowles*, 143 F. 2d 602 (U. S. Emergency Court of Appeals 1944). The Court held that services supplied by Automatic Fire Alarm Company of New York could not be considered as a "commodity" either in the ordinary and accepted sense of that term or under the Emergency Price Control Act of 1942, §302(c), U.S.C.A. App. §942(c).

there is a hint that perhaps the District Court intends to consider any deviation a discrimination as if the case were concerned with discriminatory sales of a commodity. Hints or suggestions are hardly a proper means of setting out the terms of an injunction which must be obeyed if one is to avoid punishment for contempt of court. No precedent has been noted where a final decree went so far as to require the filing of prices, price changes and price deviations with the prosecutor on some theory that such relief was needed to effectuate the intended purposes of the Sherman Act. Furthermore, since one of the purposes of the decree must be to promote future competition, it is inconsistent to place such a restriction on AFANY in regard to competitive pricing.

In enjoining any acquisitions by AFADEL in the designated market, the District Court has acted in the absence of any evidence of any previous acquisitions on the part of AFADEL, or its subsidiary. Thus the decree cannot be considered a measure attempting to prevent a repetition of any wrongful acquisitions in the past.

AFADEL and its subsidiary should be free to compete on the same basis as competitors, and free to expand into operations from which they were allegedly previously excluded. The District Court, however, has condemned any expansion by acquisition. In meeting competition after divestiture, AFANY should stand on the same footing as its competitors. Having no history of abuse of such privilege, it should be able to make any lawful purchase of assets of any business in the designated market; otherwise any such assets becoming available for purchase would necessarily go to competitors. In such case, the decree would be placing shackles on AFANY preventing it from going forward on its own, free of the alleged restrictions heretofore placed upon it. The decree can thus defeat itself by so confining AFANY that it could not possibly survive in the face of any competition, and particularly that of the more aggressive or acquisitory variety.

The injunction against any further association with James Douglas Fleming, the president of Grinnell, after

April 1, 1966, is perhaps the most pointed indication of the severity of punishment intended by the District Court. Mr. Fleming has been a member of the Board of Directors of AFADEL since 1949. At no time during the trial was there any indication that the Court looked upon Mr. Fleming as an intentional or even negligent wrongdoer.

Certainly Mr. Fleming was not one of the "*cognoscenti*" in the antitrust field. In any event, it seems that in the Court's post-trial development of the decision, Mr. Fleming, who was at first considered "not likely to be on anyone's list of Napoleons" (OL 9; R 763) suddenly became "a man of * * * capacity, sophistication, and, possibly, risktaking temperament" (OR 2; R 765). In the same paragraph, it was suggested that "maybe he shrewdly weighed business advantage against business disadvantage." The Court also suggested that maybe he had a keen, appraising eye estimating the law's delays. In any event, Mr. Fleming finally emerged in the opinion on relief as "the vigorous captain of the defendants' conspiracy to monopolize," and he was singled out for banishment (R. 766).

The evidence however, contains no suggestion that Mr. Fleming participated in the details of the operations of AFANY's central stations. It appears from his testimony, without contradiction, that neither he nor any of his associates from Grinnell who sat on the Board of Directors of AFADEL ever overruled AFADEL's management (R 690-694). Mr. Fleming admittedly had no experience in the fire alarm business nor in the central station protection service business (R 668-669; 671-672). There was no suggestion that he had been guilty of any wrongdoing. There is no reason to assume that he would not comply with orders of the Court. This is not a case of a known habitual offender who has shown that he cannot reasonably be expected to comply with court orders.

While the direction for removal of Mr. Fleming is aimed at him personally, and follows proceedings in which his personal conduct was not directly in issue, and in which no charge was made against him, and he had no opportu-

nity to defend himself, AFADEL, is nevertheless, affected. His banishment deprives the present and future stockholders of AFADEL of the free right of choice of directors. In this connection it should be remembered that Grinnell does not own all the stock of AFADEL. There are minority stockholders who should have the freedom to seek to retain the benefit of Mr. Fleming's service and judgment as a director.

It is in this light that AFADEL complains of the decision below as depriving it of its liberty and freedom of action without due process of law in violation of the Fifth Amendment to the Constitution.

POINT VII

The additional relief requested by the Government is unwarranted.

The Government has appealed from the final decree on the ground that it has not afforded the Government any effective relief. In making this claim, the Government requests additional provisions requiring compulsory sale of equipment to customers, and requiring one-year service contracts and provisions giving the Government visitation rights to police compliance with the decree.

Although AFADEL is here attacking all the basic elements of the decree affecting it, and thus seeks a reversal of the decision below, and a dismissal of the Government's entire complaint, AFADEL must answer the Government's appeal for additional relief with the simple objection that the District Court in the exercise of its discretion, refused to grant the additional relief which the Government now asks this Court to require.

In earlier cases this Court has taken the position that the appropriateness of the decree rests largely within the discretion of the trial court, and that this Court will not interfere in the absence of a showing that the District Court

has abused its discretion or granted relief which is inadequate or inappropriate in the particular case.

See:

United States v. *United States Gypsum Co.*, 340 U. S. 76, 89 (1950);
Lorain Journal Co. v. *United States*, 342 U. S. 143 (1951);
United States v. *W. T. Grant Co.*, 345 U. S. 629 (1953);
Associated Press v. *United States*, 326 U. S. 1 (1945);
International Boxing Club v. *United States*, 358 U. S. 242, 245, 253 (1959).

The practice of retaining title to equipment installed in a customer's premises which has to be maintained and serviced over a period of time is not unique. It is comparable to the practice of telephone and telegraph companies. In this connection, it will be remembered that the appellants Holmes and ADT had originally been subsidiaries of New York Telephone Company and Western Union, respectively, before Grinnell acquired a controlling stock interest (R 674-675; 677).

AFANY, like any other central station operator, uses leased telephone lines and therefore the whole pattern of the operation fits in with the normal operation of telephone or telegraph companies although on a much smaller scale.

As in the case of telephone equipment, there are many practical reasons why AFANY should keep title to its equipment. Retention of title imposes the responsibility for maintenance on the company which has undertaken to provide the service. It also encourages the development and substitution of better equipment for uniform service. It assures the company of access to the equipment for inspection and maintenance.

Perhaps the most important reason for retaining title is that the National Board of Fire Underwriters' regulations require that for accreditation, the equipment must be

owned and operated by an approved central station protection service company (Ex. 1, Ch. 1, Art. 100; R 792).

The Government's request for compulsory sale of the equipment to the customer would lead not only to divided responsibility for the security and integrity of the protection systems, but also would defeat insurance accreditation, which is of major concern to many customers and which both the Government and the District Court used, erroneously, we think, to limit the relevant market.

As to the Government's request for a limitation on the term of service contracts, this proposal is predicated upon the argument that any contract term in excess of one year restricts or excludes competition. The primary objection to any such additional relief is that any such restriction upon AFANY would put it in a non-competitive situation, and at an insurmountable disadvantage. Every other central station protection service company in the three areas in which AFANY has its central stations uses the five-year contract to provide fire and water flow alarm service.

Another objection to any such requirement being put upon AFANY is that its entire price structure would have to be changed, and the entire cost of installation, operation, maintenance and inspection as well as all overhead and profit would have to be collected from the customer during a one-year term. A five-year term makes the price situation easier for the customer. The Government offered no evidence to show that any customer would desire the requested change and be willing to pay for everything in one year.

The Government's request is predicated solely upon a theory that if the contracts of AFANY are limited to one year, more competition may develop. In our view, competition would necessarily disappear, because competitors would still be able to solicit five-year contracts with a wider cost spread, while AFANY, under the requested restriction, would necessarily have to seek all its cost within one year. In such case, AFANY would hardly be able to obtain any business against such competition.

As to the Government's request for visitation rights, the District Court refused this provision in the exercise of its discretion. The Court undoubtedly thought that in the relatively small fields in which AFANY operated, any violation of the decree would come to light of itself without any necessity for policing. An acquisition, for example, could hardly be hidden from public notice, much less the attention of the Government.

Similarly, any prohibited activity directed against a competitor would become known to that competitor, who could readily report it. In all, there is nothing in the record to suggest any need for visitation rights to facilitate policing the decree.

Conclusion

The foregoing argument on behalf of AFADEL leads to the following conclusions:

1. The Government failed to make out any case against it or against AFANY. AFADEL is a holding company and is not and never has been engaged in any phase of the alarm business. Its operating, and only, subsidiary is AFANY [not named as a defendant] and there was no evidence that the latter was engaged in any activity in, or affecting, interstate commerce, or that it committed any act or omission in restraint of trade, or had any predominance even in any of the only areas [3 cities] in which it operated, or that it monopolized any part of any market. As to the national market found or, rather, created by the District Court, its 2% participation was, and is, *de minimis*.

2. The District Court failed or refused to distinguish between the evidence, or lack of it, with respect to AFADEL [or non-defendant AFANY] and that with respect to the other alarm company defendants, notably ADT. On the contrary, it treated the three as one and thus indulged in the dubious process of finding, or cre-

ating, guilt by association even though it did not even remotely suggest that AFADEL or AFANY were in any way responsible for the acts or omissions of either of those companies.

3. The District Court's designation of the relevant market was invalid. Even in the separate local markets in which AFANY competed, there were many other types of competition. The finding of joint predominance of the alarm companies cannot be supported as to AFANY because of its minimal share (2%).

4. The post-trial holding that a mere showing of relevant market and a predominance therein shifted the burden of proof to AFADEL to establish its innocence was both erroneous and untimely. It amounts to an *ex post facto* promulgation of a new per se violation rule contrary to the decisions of this Court.

5. The proceedings by which the decree was reached were unfair, and constituted a denial of due process.

6. The decree improperly enjoins AFADEL, AFANY and all acting for them to obey the law without specifying the particular conduct intended to be restrained.

7. Instead of restoring or fostering competition, the decree unjustifiably requires the filing of prices and reports of deviation, and enjoins acquisitions although there is no history of unlawful acquisitions. The provisions are needlessly punitive, and tend to destroy AFANY's ability to compete.

8. The cruel banishment of Mr. Fleming from the Board of Directors of AFADEL and AFANY is not a proper measure to enforce the Sherman Act. Nothing in the case warranted such "Draconian measures of great severity" (R 129), which needlessly hurts an individual non-defendant, and at the same time deprives the stockholders of AFADEL and AFANY of their freedom to seek his judgment and counsel as a director.

As to the subjects of the Government's appeal, the Government failed to show any need for the additional relief requested as to AFADEL. Previous violation and misconduct were not shown. Indeed, the relief requested would so shackle AFANY that its ability to meet competition on a common ground would be destroyed. Thus, the decree itself, instead of restoring and fostering competition (which admittedly exists), would prevent AFANY from properly competing.

For these reasons the decree should be reversed, and the case should be remanded with instructions to dismiss the complaint as to AFADEL and, if this Court does not direct dismissal of the complaint, then the case should be remanded for a new trial before another judge with appropriate instructions.

Respectfully submitted,

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